

1  
2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 UNITED STATES OF AMERICA,

11 Petitioner,

12 v.

13 PAUL W. HIATT,

14 Respondent.  
15

CASE NO. MC09-5020JRC

ORDER GRANTING  
PETITIONER'S MOTION TO  
VOLUNTARILY DISMISS  
PETITION WITHOUT  
PREJUDICE

16 This matter is before the court upon petitioner's motion to dismiss (Doc. 13). After  
17 reviewing the record, the court finds and orders the following:

18 Petitioner's motion to voluntarily dismiss its petition was filed with the court on  
19 December 18, 2009. The Petitioner (Doc. 1) seeks judicial approval of levy by the Internal  
20 Revenue Service upon a principal residence.

21 Respondent was subsequently served on November 17, 2009, with a copy of the court's  
22 order providing him notice that he was entitled to file written objections to the petition and if  
23 written objections were received in a timely manner, the court would hold a hearing to consider  
24 the objections on December 22, 2009. Docs. 8 & 9. Respondent filed objections with the court  
25 on December 10, 2009.  
26

1 The instant motion to dismiss was filed before the December 22, 2009 hearing. The court  
2 cancelled the hearing, and to provide respondent a full and fair opportunity to respond to the  
3 motion, the matter was set for consideration on the court's January 22, 2009 motion calendar.  
4 Doc. 14.

5 Respondent filed two pleadings in response to the motion. On January 19, 2010, the  
6 court received respondent's brief arguing for dismissal of the matter with prejudice, and on  
7 January 22, 2010, the court received respondent's cost bill, seeking an award of costs associated  
8 with the defense of the matter.  
9

10 After reviewing the matter, petitioner's motion to dismiss this matter without prejudice is  
11 GRANTED.

12 Under Rule 41, a petitioner has the right to voluntarily dismiss his case when no answer  
13 or motion for summary judgment has been filed by an adverse party. Rule 41(a)(1) specifically  
14 provides that dismissal as a matter of right can be foreclosed only by the filing of an answer or a  
15 motion for summary judgment. Roddy v. Dendy, 141 F.R.D. 261, 262 (S.D. Mississippi, 1992).  
16 Unlike a Rule 41(a)(1) dismissal, a Rule 41(a)(2) dismissal requires court approval and is only  
17 effective "upon such terms and conditions as the court deems proper." Fed.R.Civ.P. 41(a)(2);  
18 Stevedoring Servs. of Am. v. Armilla Int'l B.V., 889 F.2d 919, 921 (9th Cir.1989). When ruling  
19 on a motion to dismiss without prejudice, the district court must determine whether the  
20 respondent will suffer some plain legal prejudice as a result of the dismissal. See Hyde & Drath  
21 v. Baker, 24 F.3d 1162, 1169 (9th Cir.1994); Hamilton v. Firestone Tire & Rubber Co., 679 F.2d  
22 143, 145 (9th Cir.1982).  
23  
24

25 Petitioner explained that respondent's objections included the contention that his wife,  
26 Marileen J. McMahon, owns an undivided one-half interest in the residence that would be levied

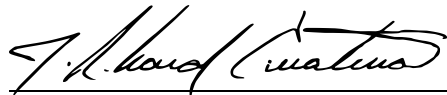
1 upon by the Internal Revenue Service. Petitioner points out that this is not a valid defense to the  
2 levy action, but that it would be a cloud on the title. Petitioner believes that the property may not  
3 be marketable due to Ms. McMahon's purported fractional interest in the property. As such,  
4 petitioner intends to dismiss this action and file a separate foreclosure action pursuant to 26  
5 U.S.C. §§7401 and 7403 so that the rights and interests, if any, of Ms. McMahon may be  
6 properly adjudicated.  
7

8 Respondent's objections (Doc. 12) and response to the motion to dismiss, filed on  
9 January 19, 2009, are based on a challenge to the court's jurisdiction over this matter. The court  
10 finds no merit to respondent's arguments and allegations. For instance, respondent argues, citing  
11 many different legal arguments, that the Internal Revenue Service has committed a fraud in its  
12 processing of its claims and that the U.S. District Court is "an inferior legislative tribunal of  
13 'special jurisdiction' [that] lacks personal jurisdiction in this matter." Doc. 12 at 12.  
14

15 A review of the petition and affidavit, along with the relevant statutes does not support  
16 respondent's contentions. Moreover, this court has been specifically granted the congressional  
17 authority to entertain the underlying petition. 28 U.S.C. §1340; 26 U.S.C. §§ 6334 and 7402(a).  
18 The court finds no prejudice in allowing the matter to be dismissed without prejudice pursuant to  
19 Rule 41(a)(2). In addition, the court notes that dismissal as a matter of right pursuant to Rule  
20 41(a)(1) may be warranted, as respondent's objections could be construed as a motion to dismiss  
21 based on a lack of jurisdiction argument. Although a plaintiff does not have the right to dismiss  
22 an action under Fed. R. Civ. P. 41(a)(1) where a respondent has filed an answer or motion for  
23 summary judgment, the petitioner may terminate its action under Fed. R. Civ. P. 41(a)(1) even if  
24 the respondent has filed a motion to dismiss. Concha v. London, 62 F.3d 1493, 1506 (9th Cir.  
25 1995); *citing* Miller v. Reddin, 422 F.2d 1264, 1265 (9th Cir. 1970).  
26

1 The Clerk is directed to send a copy of this order to respondent at his last known address.

2 Dated this 28th day of January 2010.

3  
4  
5 

6 J. Richard Creatura  
7 United States Magistrate Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26